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No. 04-356

Supreme Court, U.S.
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In The

Supreme Court of the United States

OSCAR W. EGERVARY,

Petitioner,

v.

VIRGINIA YOUNG, JAMES SCHULER, FREDERICK P. ROONEY, JAMES J. BURKE, JEFFREY C. NALLIN, AND JOHN DOES ONE-TEN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY TO BRIEFS IN OPPOSITION

Gary L. Azorsky
Counsel of Record
Casey M. Preston
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

Counsel for Petitioner

THE LEX GROUP^{DC} ♦ 1750 K Street, NW ♦ Suite 475 ♦ Washington, DC 20006
(202) 955-0001 ♦ Fax: (202) 789-1911 ♦ www.thelexgroupdc.com

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Petitioner Challenges The Third Circuit's Decision That Respondents Are Absolutely Immune From Damages Liability Under *Bivens* For Their Execution Of The Unconstitutional Warrant On The Basis That Such Actions Were "Shrouded . . . With A Cloak Of Legitimacy."

This case involves the violation of petitioner's Fifth Amendment right to due process of law caused by government actors' execution of an unconstitutional warrant that authorized the taking of petitioner's infant son from his possession and removal from the country without any notice or opportunity to be heard. The respondents include State Department employees Virginia Young and James Schuler ("federal respondents") and private attorneys Frederick Rooney, James Burke ("attorney respondents") and Jeffrey Nallin.[1]

The facts of this case, as relevant to and outlined in greater detail in the petition, consist of four events: (1) respondents' preparation and presentation to the court of an unconstitutional warrant in lieu of writ of habeas corpus ("*pre-approval* conduct"); (2) the court's approval of the unconstitutional warrant; (3) respondents' execution of the unconstitutional warrant ("*post-approval* conduct"); and (4) the harm caused to petitioner by respondents' execution of the unconstitutional warrant.

With respect to the *pre-approval* conduct, the Third Circuit determined that although respondents' preparation and presentation of the unconstitutional warrant was "clearly a cause of [petitioner's] harm," the judge's approval of the warrant after "independent judicial review" was an intervening, superceding cause that broke the chain of causation for purposes of *Bivens* liability. (Pet. App. A23). Thus, in reaching its decision that respondents could not be liable for their *pre-approval* conduct, the Third Circuit

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[1] Mr. Nallin did not file a response to the petition.

applied the tort law principle of superceding cause. Although petitioner disagrees - from both a factual[2] and legal perspective - with the Third Circuit's decision regarding respondents' *pre-approval* conduct, petitioner does *not* challenge that decision in his petition.

Instead, the question presented in the petition concerns the Third Circuit's unreasoned determination that respondents cannot be liable for damages under *Bivens* for their *post-approval* conduct, or the execution of the unconstitutional warrant, because "the judge's approval of the *ex parte* Order . . . shrouded any subsequent actions with a cloak of legitimacy . . . ." (Pet. App. A24). As discussed fully in the petition, the Third Circuit, by deciding that respondents cannot be liable under any set of circumstances for their *post-approval* conduct, effectively extended absolute immunity to federal officers who present a warrant to a court and then execute the warrant and who knew or should have known that the execution of the warrant would result in a constitutional violation. This extension of absolute

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[2] The Third Circuit overlooked the following critical testimony from the Honorable William J. Nealon which could cause a reasonable jury to conclude that Judge Nealon's decision was influenced by a factual misrepresentation. Judge Nealon summarized what Mr. Rooney represented to him upon presenting the unconstitutional warrant as follows:

> . . . I thought he said he was retained, at least that's the impression I got, by the State Department to present this petition that there had been a proceeding in Hungary where a — at which the father was represented. And the court awarded custody to the mother and that the father went over to Hungary, kidnapped the youngster and took the youngster back and was now located up in Cresco in Monroe County.

(Court of Appeals Appendix 619). In fact, contrary to Mr. Rooney's representation to the court, there was no Hungarian court order at the time that petitioner rescued his child from abduction by the mother in Hungary.

immunity violates fundamental Supreme Court jurisprudence which commands that before extending absolute immunity to government actors from damages liability for unconstitutional behavior a court must engage in a two-part inquiry. *See Wyatt v. Cole*, 504 U.S. 158, 163-64 (1992). The initial inquiry is whether the "tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that Congress would have specifically so provided had it wished to abolish the doctrine." *Wyatt*, 504 U.S. at 164. If an official was indeed accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the second inquiry is whether the history and purpose of *Bivens* and Section 1983 counsel against recognizing the same immunity in these actions. *Malley v. Briggs*, 475 U.S. 335, 340 (1986).

Respondents do not dispute that, had the Third Circuit applied well-established precedent, it would have determined that common law did not recognize an immunity analogous to the rule it created. Nor do respondents disagree that, had it applied well-established precedent, the Third Circuit would have learned that extending absolute immunity to government actors who obtain and execute unconstitutional warrants or court orders is inconsistent with the history and purpose of *Bivens* and Section 1983. Indeed, much of respondents' opposition briefs are dedicated to defending the Third Circuit's unchallenged application of the principle of superceding cause to their *pre-approval* conduct. Rather than confront the question raised by the petition, respondents attempt to distract the Court from the Third Circuit's egregious disregard of fundamental Supreme Court precedent.[3] In so doing, respondents completely side-step the Third Circuit's

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[3] In fact, the federal respondents submit a reformulated question presented focused solely upon the Third Circuit's proximate cause analysis.

remarkable holding that the district court's approval of the unconstitutional order "shrouded any subsequent actions with a cloak of legitimacy."

Proximate Cause Could Not Have Been The Basis Upon Which The Third Circuit Granted Respondents Summary Judgment With Regard To Their Post-Approval Conduct

Respondents argue that summary reversal or *certiorari* should not be granted simply because the Third Circuit prefaced its opinion by expressly stating that it need not consider absolute immunity arguments inasmuch as the issue of proximate cause is determinative. (*See* federal respondents' brief ("Fed. Resp. Brf.") at 11 (citing Pet. App. A13-14); attorney respondents' brief ("Atty. Resp. Brf.") at 16 (citing Pet. App. A14)).[4] Thus, according to respondents, the Third Circuit determined that they could not be liable for their *post-approval* conduct because such actions did not proximately cause petitioner's harm. However, the very terms of the Third Circuit's analysis demonstrate that the appellate panel only applied the superceding cause principle to *pre-approval* conduct and not to *post-approval* conduct:

> Traditionally, in tort law, "proximate cause" has been defined as a person's wrongful conduct which is a substantial factor in

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[4] Specifically, the Third Circuit prefaced its opinion by stating:

> Defendants raise a number of defenses to the claims asserted against them, including lack of venue, waiver, absolute immunity, qualified immunity, and good faith. However, we need not reach any of these issues, as we conclude that Egervary, by failing to demonstrate proximate cause with respect to any defendant, has failed to establish an essential element of his claim.

(Pet. App. A14 (footnote omitted)).

> bringing about harm to another. *See* Restatement (Second) of Torts § 431 (1965). However, an intervening act of a third party, which actively operates to produce harm *after* the first person's wrongful act has been committed, is a superseding cause which prevents the first person from being liable for the harm which his *antecedent* wrongful act was a substantial factor in bringing about. *See* Restatement (Second) of Torts § 440-441 (1965).

(Pet. App. A14 (emphasis added)). Consequently, the district court's error in approving the unconstitutional warrant was not – and logically could not have been – a superceding cause of harm to petitioner by reason of respondents' *post-approval* conduct. Respondents' suggestions that the Third Circuit's causation analysis applied to their *post-approval* conduct are simply not borne out by the appellate panel's opinion.

The Potential Availability Of A Speculative Diplomatic Process Through Which Petitioner Could Attempt To Obtain The Return Of His Son Does Not Preclude Petitioner From Recovering Civil Damages Under *Bivens* For The Violation Of His Constitutional Rights

The Third Circuit mentioned in dictum that petitioner was not left without a remedy after his child was unconstitutionally removed from the United States by or with the assistance of respondents. (*See* Pet. App. A24). The attorney respondents contend that, as a result of the existence of an alternative available remedy, a *Bivens* action need not be inferred. (*See* Atty. Resp. Brf. at 21 (citing Pet. App. A25)). Aside from its obvious irrelevance to the issue of the Third Circuit's expansion of absolute immunity, this argument is irrelevant to the petition in several other respects.

First and foremost, the attorney respondents misconstrue this Court's rulings regarding alternative available remedies. The attorney respondents cite *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 67-68 (2001) in support of their position. The Court in that case discussed the availability of alternative remedies to the constitutional deprivation giving rise to a *Bivens* claim. *See id.* at 72-74. The Court distinguished between the alternative state court remedies that were "inconsistent or even hostile" to a remedy inferred from the Fourth Amendment in the original *Bivens* case ("When a federal officer appears at the door and requests entry, one cannot always be expected to resist. . . . Yet lack of resistence alone might foreclose a cause of action in trespass or privacy") to the alternative tort remedy available to the federal prisoner in *Malesko* which was not pursued due solely to strategic choice. *See id.* at 73-74. In the present action, as in the original *Bivens* action, petitioner could have attempted to resist the actions of the federal officers and attorney respondents acting under color of federal law, but resistence, giving rise to potential state law remedies of trespass and privacy, may have amounted to a crime. *See id.* at 73. Thus, the only remedy to his harm is available through the implied constitutional tort remedy under *Bivens*.

Indeed, the remedy proposed by the Third Circuit is not a remedy for petitioner's constitutional harm at all. Rather, it amounts to nothing more than speculation as to how an appeal of the district court's order may have resulted – through an order entered by a court with no jurisdiction to enforce its order over foreign entities, and then through diplomatic efforts to be undertaken by the same Department of State which aided in the removal of petitioner's child in the first place – in the eventual return of petitioner's child. Even such a fanciful result, however, would not have erased the constitutional violation or

remedied the violation of petitioner's constitutional right to due process of law. *See Stanley v. Illinois*, 405 U.S. 645, 647 (1972) (recognizing that the Court does not "embrace[] the general proposition that a wrong may be done if it can be undone. . . . [I]f there is delay between the doing and the undoing petitioner suffers from the deprivation of his children, and the children suffer from uncertainty and dislocation"). Thus, an appeal that does not remedy the constitutional injury is not an alternative available remedy at all.

Respondents' Speculation Over Potential Defenses Should Not Prevent Correction Of The Third Circuit's Egregious Error Which, If Left Standing, Will Have Far Reaching Implications

Respondents argue that this petition should not be granted because, irrespective of the Third Circuit's decision regarding proximate causation, the attorney respondents acted in good faith (*see* Atty. Resp. Brf. at 23) and the federal respondents are entitled to qualified immunity (*see* Fed. Resp. Brf. at 16). The district court in this case, however, determined that the question of whether the attorney respondents are entitled to a defense of good faith is a fact question as to which summary judgment is inappropriate and which must therefore be decided by a jury. (*See* Pet. App. E13). Moreover, petitioner raised on appeal to the Third Circuit the question as to whether the defense of good faith is legally available to the attorney respondents, but the court did not reach that issue in its decision. Similarly, although the federal respondents express confidence in their qualified immunity defense and assert that "there is no basis upon which to deny [them] qualified immunity," the district court and petitioners strongly disagree. (*See* Pet. App. D54-D75). Like the good faith defense, the Third Circuit did not analyze or rule upon the qualified immunity issue. In short, these defenses, as to which the record is rife with

contradicting facts, are not ripe for adjudication or determination at this juncture.

CONCLUSION

For the foregoing reasons and those stated in the petition for writ of *certiorari*, petitioner respectfully requests that the decision of the Third Circuit be summarily reversed in this case. In the alternative, the petition for writ of *certiorari* should be granted to examine the Third Circuit's unexplained expansion of absolute immunity.

Respectfully submitted,

GARY L. AZORSKY
Counsel of Record
CASEY M. PRESTON
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103

Counsel for Petitioner

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